Federal Evidence Review

Highlighting Recent Federal Evidence Cases & Developments

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Federal Evidence Review Coverage

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- Cases Covered: 39
- Evidence Principles: 94
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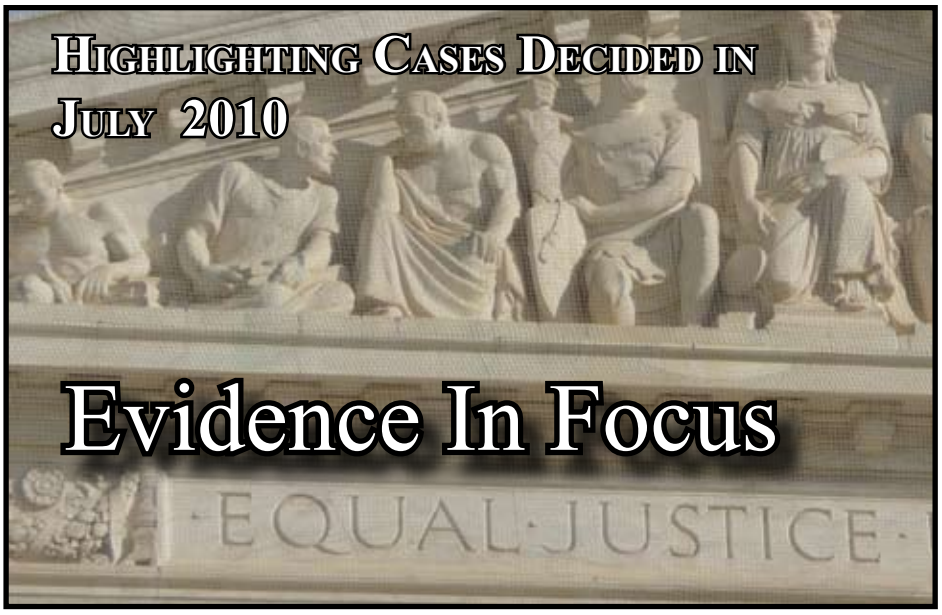

Seventh Circuit Removes "Resort To Inextricable Intertwinement" Theory Of Admissibililty: After criticizing the use of the "inextricably intertwined" theory to admit evidence independent of FRE 404(b), the Seventh Circuit overrules prior cases applying this theory and rejects its further use — *United States v. Gorman* (7th Cir.) (No. 48/p. 650)

➢ *Theory No Longer Applicable*: As the Seventh Circuit explained: "We have recently cast doubt on the continuing viability of the inextricable intertwinement doctrine, …. [T]he inextricable intertwinement doctrine has ... become overused, vague, and quite unhelpful. To ensure that there are no more doubts about the court's position on this issue — the inextricable intertwinement doctrine has outlived its usefulness. Henceforth, resort to inextricable intertwinement is unavailable when determining a theory of admissibility." (citations omitted)

➢ *Binding Seventh Circuit Precedent*: In recognizing that the decision was overruling prior circuit decisions applying the inextricable intertwinement doctrine, the panel "circulated it to the full court as required by our Circuit Rule 40(e)" and "[n]o judge favored a hearing en banc."

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Evidence In Focus provides an overview of key evidence cases published during the prior month. It highlights some of the notable evidence principles and their page numbers in the **Evidence Case Docket.** For example, (No. 3/p. 650) refers to an evidence principle number "3" at page 650 in the Evidence Case Docket. For more on navigating and using the REVIEW and the ***Evidence In Focus*** section, see p. 609.

Evidence In Focus continued from cover page

Attorney-Client Privilege In Corporate Setting: Ninth Circuit reviews assertion of attorney-client privilege by outside director who claimed he jointly held the privilege with the company that waived it; circuit considered the substance of his relationship with the company and concluded he served as an agent and functional employee; in adopting and applying Third Circuit *Bevill* test (noted below), the defendant failed to meet his burden to show he held a personal attorney-client privilege with the company attorneys on the challenged communications — *United States v. Graf* (9th Cir.) (No. 62/p. 663)

➢ Bevill *Test*: Ninth Circuit adopts and applies the five-factor *Bevill* test of the Third Circuit which requires the proponent of the privilege to show: "(1) he approached the attorneys for the purpose of seeking legal advice; (2) when he did so, he made it clear to the attorneys that he was seeking legal advice in his individual rather than in his representative capacity; (3) the attorneys saw fit to represent him personally, knowing a conflict could arise; (4) his conversations with the attorneys were in confidence; and (5) "the substance of [his] conversations with [the attorneys] did not concern matters within [the company] or the general affairs of" the company. (citing *In re Bevill, Bresler & Schulman Asset Mgmt. Corp.*, 805 F.2d 120, 123 (3d Cir. 1986))

➢ Bevill *Applicable To "Functional Employee"*: Because the defendant was an agent and functional employee, based on what he did for the company, his communications with the company's corporate counsel were within the company's attorney-client privilege, which the company waived

Criticizing Background Hearsay Narrative Of Case: In political corruption case, Seventh Circuit criticizes as a violation of the hearsay rule and Confrontation Clause the use of an agent to provide a narrative summary, not based on the agent's personal knowledge, of how the wiretaps were reviewed and approved by supervisors and by the court; the convictions were not reversed because the error did not rise to the level of plain error — *United States v. McGee* (7th Cir.) (No. 5/p. 617)

➢ *Possible Disciplinary Steps Suggested*: The Seventh Circuit criticized the prosecutor and court in allowing the narrative hearsay: "Although McGee is not entitled to a new trial, we are dismayed by the prosecutor's conduct and disappointed by the district judge's failure to intervene. The extensive hearsay did not slip in by accident, in the heat of the moment; the prosecutor must have carefully planned this line of testimony. The proper way to introduce jurors to forthcoming wiretap evidence ought to be featured in the United States Attorney's Manual. The United States has not attempted to defend the propriety of the prosecutor's tactics. Waiver and the plain-error doctrine may insulate judgments from reversal, but recurrence of an episode such as this may lead to the opening of a disciplinary proceeding for the lawyers involved."

Legal Advice Irrelevant On Specific Intent Defense: In fraud prosecution, D.C. Circuit finds cross-examination of co-conspirators about what a title attorney had told them "about the legality of the [charged] mortgage scheme," as support for the defendant's lack of specific intent was irrelevant; the defense proffer was based on testimony to be offered later which never was introduced as the defendant elected not to testify — *United States v. Hall* (D.C. Cir.) (No. 74/p. 675)

➢ *Conditional Evidence*: As circuit explained: "If the evidence were admitted subject to being stricken, and the defendant did not testify or testified inconsistently with the disputed testimony, then the judge's act in ordering it stricken might well call to the jury's attention in an arguably impermissible manner the fact that the defendant had exercised his rights against self incrimination. We are not deciding that it would have been error for the judge to run that risk, but it certainly was not error for him to refuse to do so." (citation omitted)

Credibility of Qualified Expert No Ground For Exclusion Under FRE 702: In medical malpractice trial, reversing jury verdict based on trial court's erroneous exclusion of the plaintiffs' lone expert witness for perceived "bias[] in favor of plaintiffs in medical malpractice cases" based on the court's finding that the expert "gave testimony exclusively for plaintiffs during the past year, that he is paid to give lectures on medical malpractice and ... that he might testify irresponsibly"; the exclusion invaded the province of the jury to assess witness credibility — *Cruz-Vazquez v. Mennonite General Hosp., Inc.* (1st Cir.) (No. 68/p. 669)

➢ *Trial Court Inquiry*: The First Circuit underscored that "the Supreme Court has emphasized that the 'overarching subject' of the trial court's inquiry when assessing proposed expert testimony "is the scientific validity — and thus the evidentiary relevance and reliability — of the principles" the witness uses and not the particular bias of the witness (quoting *Daubert v. Merrell Dow Pharm.*, 509 U.S. 579 (1993))

➢ *Reiterating* Mooney: The First Circuit reiterates its conclusion in *United States v. Mooney*, 315 F.3d 54, 62 (1st Cir. 2002), that if the expert qualifies and his testimony is relevant, the expert "must be permitted to present testimony"

Excluding Deferred Prosecution Agreement: In confronting an open issue, a divided Sixth Circuit panel affirms exclusion of evidence of the defendant's rejection of a pre-indictment deferred prosecution agreement (DPA), which was offered by the defendant to show lack of criminal intent as "an innocent person is more likely to reject a DPA than is a guilty one"; it was unnecessary to resolve the issue since the DPA was not necessarily "probative of a 'consciousness of innocence," since there were other consequences and reasons for declining the DPA — *United States v. Geisen* (6th Cir.) (No. 60/p. 661)

Excluding Evidence Of Offer To Take Polygraph Test: In a false statement case, Seventh Circuit affirms the exclusion of evidence that the defendant offered to take a polygraph test based on the risk of confusing and misleading the jury – *United States v. Dinga* (7th Cir.) (No. 39/p. 644)

➢ *Type Of Records*: Circuit notes risk of confusion: "A juror, having little understanding of the admissibility or reliability of any subsequent results, may erroneously believe that any offer necessarily meant [defendant] Dinga was innocent. More importantly, Dinga's offer to take a test would ... be only marginally probative as to his credibility. Absent an agreement that polygraph results (favorable or not) would be admissible in court, Dinga had little at stake by expressing his willingness to submit to a polygraph test. No test was ever taken, and there is no way of knowing what Dinga knew about the subsequent admissibility of any such test results."

➢ *Circuit Consensus*: Circuit notes that "[m]ost circuits, including ours have been wary of this type (polygraph) of self-serving evidence."

Reversing Based On Trial Court's Failure To Make Clear FRE 404(b) Record: Seventh Circuit reverses and remands sex offense conviction based on the trial court's failure "to propound reasons for its conclusion that the probative value of" the voluminous other act evidence (involving the images of child pornography, instant messaging conversations with others, and the testimony of a woman who noted the defendant had sex with her when she was a minor) was not substantially outweighed by the danger of unfair prejudice — *United States v. Ciesiolka* (7th Cir.) (No. 50/p. 652)

➢ *Limiting Instructions Also Inadequate:* Although limiting instructions may generally cure the difficulty, the trial court's delivery of a "boiler-plate" general limiting instruction failed to cure the error, particularly where the judge refused limiting instructions during the presentation of the FRE 404(b) evidence, despite "repeated[]" requests

Third Circuit Cautions Against General, Laundry List FRE 404(b) Instructions: In felon in possession of firearm trial, in which the defendant's post-arrest statements ("that he had access to guns, that he was willing to use guns, that he had shot at someone with whom he had an ongoing feud, that that person had tried to kill him") were admitted to show motive, the Third Circuit encouraged trial courts to clarify the specific limited grounds to admit other act evidence — *United States v. Lee* (3d Cir.) (No. 51/p. 653)

➢ *Circuit majority advised*: "The list of proper evidentiary purposes set forth in 404(b) and repeated in the model instruction, which is the list that the District Court used here, is not made improper solely because the Court was not as clear as it could have been in articulating why motive was a proper purpose that the jury could rely on when considering Lee's statements to Kraus. *We take this opportunity to encourage district court judges to delineate the specific grounds for admissibility of 404(b) evidence, even if the entire 404(b) litany has already been recounted.*" (citation omitted)

Distinguishing Lay And Expert Testimony: In fraud and money laundering trial, testimony concerning executive compensation and amount of wire advances was lay testimony, based on everyday reasoning, and not expert testimony, based on specialized knowledge; the witness summarized the data and offered no conclusions about the data — *United States v. Faulkenberry* (6th Cir.) (No. 67/p. 668)

➢ *Lay And Expert Testimony*: The circuit clarified that lay testimony "results from a process of reasoning familiar in everyday life, whereas an expert's testimony results from a process of reasoning which can be mastered only by specialists in the field." (quoting *United States v. White,* 492 F.3d 380, 401 (6th Cir. 2007) (internal quotation marks omitted))

Summaries Need Not Be Admitted: In fraud and money laundering trial, on summary testimony concerning executive compensation and amount of wire advances, Sixth Circuit notes that a "district court may admit summary evidence under Rule 1006 ... without admitting the underlying documents upon which the testimony is based" — *United States v. Faulkenberry* (6th Cir.) (No. 91/p. 689)

Business Planner As Business Record: In securities fraud case, Second Circuit concludes that a cooperating witness's business planners were admissible as business records under FRE 803(6) – *United States v. Kaiser* (2d Cir.) (No. 85/p. 685)

➢ *Type Of Records*: The records included "contemporaneous handwritten entries" on his two companies," "contact log pages with preprinted spaces for recording notes pertaining to phone conversations," including conversations "with [defendant] Kaiser regarding false

confirmation letters that Kaiser asked him to send"

➢ *Essence Of Regular Practice:* Business records "need not be mechanically generated, the note-taking was established as part of "his regular business practice"

➢ *Trustworthiness Concerns*: Questions about the trustworthiness of the records went to the weight of the evidence and not admissibility, particularly where the declarant testified subject to cross-examination

Breadth Of Conspiracy Evidence Relative To FRE 404(b): Sixth Circuit notes that while a conspiracy may involve many criminal acts, these acts are not generally considered FRE 404(b) propensity evidence because, otherwise, "it would be possible only to charge someone with a drug-trafficking conspiracy, never to prove it. That is not how Rule 404(b) works." – *United States v. Williams* (6th Cir.) (No. 57/p. 658)

Judicial Notice Of Government Web Site Information: In reviewing denial of long-term disability benefits, First Circuit takes judicial notice of "relevant facts provided on the website" regarding Lyme Disease from the Centers for Disease Control, when all parties and the court cited the website — *Gent v. CUNA Mut. Ins. Society* (1st Cir.) (No. 26/p. 634)

Pretrial Notice Through Indictment Allegations: In securities fraud case, Second Circuit notes that while pretrial notice was not required under FRE 404(b) for evidence that was inextricably intertwined, had it been required, sufficient notice was provided by the indictment which "contained numerous references to events occurring prior to" the alleged conspiracy – *United States v. Kaiser* (2d Cir.) (No. 49/p. 651)

DNA Paternity Evidence Admissible In Sex Crime Prosecution: The Eighth Circuit affirms denial of defense motion to exclude "DNA paternity evidence that there was a 99.99999832% probability that" the defendant fathered the victim's child — *United States v. Jandreau* (8th Cir.) (No. 33/p. 639)

➢ *Distinguishing* Old Chief: The circuit concluded the defense reliance was unfounded on *Old Chief v. United States*, 519 U.S. 172, 191 (1997) (in felon in possession of firearm prosecution, the prosecution must accept a defendant's stipulation to the fact of the prior conviction "for an offense likely to support conviction on some improper ground"). The *Old Chief* rule is narrowly "limited to cases involving prior felony convictions."

Prostitution Expert: Ninth Circuit affirms the admission of a law enforcement expert testimony concerning "the business of prostitution and the relationships between pimps and prostitutes" in a child sex trafficking prosecution — *United States. v. Brooks* (9th Cir.) (No. 69/p. 670)

➢ *Helpfulness Standard Satisfied*: The expert testimony assisted the jury in understanding the roles and relationships of participants in prostitution, "helped place other witnesses' testimony into context. provided the jury a means to assess their credibility" and was not unfairly prejudicial

No* Bruton *Violation For Non-Testimonial Statements: First Circuit notes that where a statement is not testimonial under *Crawford*, there is no *Bruton* error under the Confrontation Clause – *United States v. Castro-Davis* (1st Cir.) (No. 4/p. 615) & *United States v. Figueroa-Cartagena* (1st Cir.) (No. 4/p. 615)

Severance Not Required Where Challenged Evidence Is Admissible Under FRE 404(b): In two cases, the Eighth Circuit underscores that a denial of a severance motion is not an abuse of discretion where the evidence in support of the challenged count would be admissible as other act evidence under FRE 404(b) — *United States v. Midkiff* (8th Cir.) (No. 53/p. 655) & *United States v. Erickson* (8th Cir.) (No. 52/p. 709)

Showing Unavailability Under FRE 804(b): First Circuit explains that a defendant's perfunctory efforts to find hearsay declarant was insufficient to meet the requirement of FRE 804(b)(3) that the declarant be unavailable for admission of the statement as one against interest – *United States v. Weekes* (1st Cir.) (No.88/p. 687)

Contradicted By A Rap Song: In trial for acts of torture committed by the defendant in Liberia during his father's presidency, admitting under FRE 401 rap lyrics found in the defendant's possession when he was arrested because the lyrics were probative on the defendant's association with the terrorist organization that he led and contradicted the defendant's claim of non-violence — *United States v. Belfast* (11th Cir.) (No. 31/p. 637)